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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1105

HONORABLE ROBERT R. MERHIGE, JR. AND HONORABLE ALBERT V. BRYAN, JR., PETITIONERS

*v.*

UNITED STATES BOARD OF PAROLE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 487 F. 2d 25.

### JURISDICTION

The judgment of the court of appeals was entered on September 26, 1973. A petition for rehearing *en banc* was denied on October 17, 1973 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court below properly issued writs of mandamus directing petitioners to vacate (1) an order authorizing the taking of the deposition of certain members of the Youth Division of the United States Board of Parole and (2) an order requiring the Board to answer written interrogatories pertaining to parole determinations of individuals not parties to this suit who are incarcerated in federal correctional institutions.

## STATEMENT

### 1. THE CRIME AND THE INITIAL DISPOSITION

On May 25, 1971, and June 24, 1971, Bernard J. Novak entered pleas of guilty in the United States District Court for the Eastern District of Pennsylvania to two charges of larceny from two federally insured banks, in violation of 18 U.S.C. 2113(b). He was subsequently sentenced to concurrent indeterminate terms of imprisonment pursuant to the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010. No appeal was taken.

Novak commenced service of his federal sentence at the Federal Reformatory at Petersburg, Virginia, on August 10, 1971. Three months later, on November 3, 1971, he received his initial parole hearing, conducted by an examiner from the Youth Division of the United States Board of Parole. The members of the Youth Division, after considering his application, denied parole and rescheduled him for another hearing in November 1972.

Novak thereafter sought special consideration by the Board of Parole of his request for release in September 1972 to permit him to enter the Community College of Philadelphia. In response to this request, a special progress report was prepared, which evaluated Novak's institutional adjustment and reviewed his release resources and plans. The report concluded with a recommendation from the institution that Novak be released on parole. After consideration of this report, the Youth Division decided that no change should be made in the Board's prior order scheduling Novak for review in November 1972.[1]

[1] In an affidavit submitted at a hearing on this matter on August 28, 1972, Dr. William Amos indicated some of the factors considered in the decision not to change the original order:

"A. At the time of the original hearing, conducted by the Youth Division in November 1971, the record indicated that subject had at least a three year history of heroin usage and that prospects for early change were guarded * * *

"B. The record indicated that subject has a rather long term history of anti-social behavior beginning at age fourteen. He was committed to a disciplinary school at that time and later was committed a second time for a charge of larceny. In addition, he was placed on probation for the illegal possession and use of narcotics in 1969, and in August of 1970, received an additional sentence in the State of Pennsylvania, also for the illegal possession and use of narcotics. These factors, together with his life style, as well as current bank robbery offenses, indicates to me that subject was not an incidental offender or a situational offender, but was a person whose value system requires reorientation, and the classification material in the record supported this opinion.

"C. At the time of the Division's initial order, it was signified in the order that subject should emphasize participation in a drug abuse program. Reports from the institution during the

2. THE INITIAL PROCEEDINGS IN THE DISTRICT COURT

On August 14, 1972, Novak, on behalf of himself and others similarly situated, filed a complaint in the United States District Court for the Eastern District of Virginia seeking injunctive and declaratory relief. He alleged that his application for parole had not been considered in accordance with the regulations governing the Board of Parole and, accordingly, that the Board abused its discretion and deprived him of due process of law. Additionally, he claimed that he was entitled to (a) access to the substance of the parole hearing examiner's recommendations and report; (b) an opportunity to respond to the adverse aspects of the report; and (c) a statement of the grounds upon which parole was denied. The government, on August 25, 1972, filed an answer on the merits of Novak's claim and moved that the complaint be dismissed.

On August 28, 1972, an evidentiary hearing was conducted before Judge Merhige on Novak's motion for a preliminary injunction, at which he testified. The court also heard testimony from an official of the Youth Corrections Division and conducted an *in camera* examination of Novak's institutional file. On the following day, August 29, 1972, the court denied the motion for a preliminary injunction but found that the complaint presented a justiciable controversy and

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past year have indicated that subject had chosen not to continue in this program. They also indicated that subject had dropped a computer training course. In addition, the most recent progress report points out that during the last year subject has incurred two major and one minor disciplinary infractions."

that it had jurisdiction to grant the relief sought (Pet. App. 16a–17a).[2] The district court pointed out that, apparently through inadvertence, the Board had not considered the recommendation of the institution's psychologist. The court suggested that the Board of Parole might wish to study this report and re-examine Novak's application for parole in light of the opinions expressed therein (Pet. App. 17a). The court deferred consideration of the question whether the case should be designated a class action (Pet. App. 18a).

On September 7, 1972, after a review of the psychologist's report and a second report prepared at the Board's behest, the Youth Division issued a new order granting Novak parole effective December 4, 1972, with the special proviso that he participate in an approved counseling program.

### 3. THE ORDER TO TAKE DEPOSITIONS OF THREE MEMBERS OF THE BOARD OF PAROLE

On September 8, 1972, the plaintiff served notice on the respondents of his intention to depose three Board members on September 15, 1972, and subpoenas were issued. On September 22, 1972, after a hearing pursuant to a motion to vacate the notice of deposition, Judge Merhige ordered the members of the Board to

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[2] In support of this conclusion, the district court relied solely upon the three-judge panel opinion in *Scarpa* v. *United States Board of Parole*, 468 F.2d 31 (C.A. 5). However, that decision was subsequently reversed. See *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (C.A. 5, *en banc*), certiorari granted and remanded for determination of mootness, 414 U.S. 809.

submit themselves for deposition.[3] On September 26, 1972, the Youth Division ordered that parole release to a community treatment center be effected October 2, 1972.

On October 4, 1972, three additional plaintiffs moved to intervene on the ground that the cause of action as to Novak had become subject to a claim of mootness. At the hearing on this motion, on October 17, 1972, the government again sought to quash the deposition order, urging that the depositions had been ordered solely to ascertain the basis for the Board's decision to parole Novak in December, and that the matter was moot as to him, since he had been paroled. Judge Bryan declined to change the earlier order of Judge Merhige requiring that the members of the Parole Board be deposed (Pet. App. 31a–32a).[4] He also granted leave for additional plaintiffs to intervene, leaving unresolved, however, the class action question. On November 8, 1972, the Board of Parole petitioned the court of appeals for a writ of mandamus.

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[3] Novak's counsel indicated that the purpose of the depositions was to "get the whys and wherefores for the Board's action in this case, action that I think is quite peculiar. * * * We attempted to take discovery on the very narrow issue of the most recent action" (Pet. App. 25a). The court, in denying the motion to vacate, stated "I too want to know why December? I too want to know whether this is retribution because a suit has been filed" (Pet. App. 27a).

[4] At the hearing, petitioner's counsel stated that "[t]he scope of those depositions will deal only with [deponents'] actions with respect to Plaintiff Novak and how those actions relate to the class action claims, but I will not ask at those depositions about 'x' number of inmates or any other files; purely the Novak matter" (Pet. App. 34a).

4. THE ORDER TO ANSWER INTERROGATORIES

On November 9, 1972, plaintiffs served on the Board a set of interrogatories seeking information relating to the parole consideration given the three plaintiff-intervenors and twenty-two additional federal inmates of the Federal Reformatory. These interrogatories contained a series of 31 questions probing extensively, as to each of the twenty-five inmates, into the parole process and the decisions of the Board in relation thereto. On December 8, 1972, the Board responded to questions 1 through 30 of these interrogatories with regard to the three plaintiff-intervenors, declining to answer interrogatories relating to the other twenty-two inmates, who were not parties to the suit. Additionally, the Board declined to answer the 31st question, which requested "the names and institutional numbers of all inmates at the Federal Reformatory at Petersburg, Virginia, who had been denied parole release either by way of continuation, set-off, or outright denial since January 1, 1971" (Pet. App. 4a). To respond to this inquiry would have required obtaining this information as to approximately 800 individuals, or nearly the total population at Petersburg.

On December 4, 1972, the Board of Parole was served with the second and third series of interrogatories, relating primarily to additional groups of thirty-one and twenty-eight inmates, respectively. While the second set of interrogatories related to inmates of the Federal Reformatory at Petersburg, Virginia, the third set sought information as to inmates of nine other federal institutions. The Board

of Parole declined to answer the questions propounded in the second and third interrogatories, which pertained to individuals who were not parties to the suit.[5] Plaintiffs moved for an order compelling defendants to answer the interrogatories. After a hearing on January 17, 1973, Judge Merhige ordered that the Board answer all questions contained in each set of interrogatories within ten days. On January 29, 1973, the district court denied the Board's motion to vacate its order requiring that the answers be filed. On February 7, 1973, respondents petitioned the court of appeals for a second writ of mandamus.

### 5. THE HOLDING OF THE COURT OF APPEALS

The court below considered the Board of Parole's two petitions for mandamus in this case together, and issued the writs (Pet. App. 1a–9a). With respect to Novak's complaint, the court found that his release on parole mooted the issues raised in his complaint and the deposition order, as it related to him, should properly have been vacated (Pet. App. 4a). As to the three plaintiff-intervenors, the court of appeals found that their pleadings alleged (Pet. App. 5a)

> only questions of law and we fail to see any necessity for extensive evidentiary development, particularly the depositions of the members of the Youth Division as well as the exhaustive interrogatories, for determination of the issues raised therein [footnote omitted].

[5] The Board responded to question 30 of the third set of interrogatories, which requested a statistical breakdown of the total number of decisions made by the Board in granting or denying parole.

The court went on to conclude that only in exceptional circumstances should members of the Board of Parole be subject to depositions (Pet. App. 6a).

Similarly, with respect to the interrogatories, the court of appeals found they bore only slight relevance to the questions of law raised in the complaints and further that interrogatories relating to seventy-eight inmates who were not parties to the suit would "violate the recognized confidentiality of the Board's records and place an unreasonable burden on the parole authorities" (Pet. App. 7a).

## ARGUMENT

Petitioners seek to raise a variety of substantive issues which are not posed by this case, such as the reviewability of actions of the Board of Parole and the impact, if any, of *Morrissey* v. *Brewer*, 408 U.S. 471, on proceedings to consider the initial grant of parole. The sole issue properly before this Court is whether the court below correctly exercised its supervisory power in issuing writs of mandamus directing petitioners to vacate their wide-ranging discovery orders.

The holding of the court of appeals regarding the plaintiff-intervenors was clearly based upon its finding that, in light of the allegations contained in the complaints, the discovery orders had been "clearly erroneous and that compliance therewith would effect a disruptive and unwarranted intrusion upon the records and resources of the Board of Parole" (Pet.

App. 9a).[6] We submit that this ruling was entirely correct.[7]

As petitioners note, both at common law and in early federal practice the writ of mandamus was appropriately issued to a lower court only in those instances where that court had made an error of jurisdictional magnitude. See, *e.g.*, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26–27. See also Comment, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 598–602 (1973). In the last two decades, however, this Court has sanctioned the use of the writ as a proper remedy where there has been a usurpation of judicial power or a clear abuse of discretion. See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260.

*La Buy* arose from two private antitrust suits involving price fixing and price discrimination in the shoe repair industry. The district court, over the objection of the parties, referred the cases to a master pursuant to

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[6] Petitioners apparently do not seriously contest the conclusion that the case is moot as to Novak personally (Pet. 8, n. 5).

[7] Contrary to petitioners' contention, no conflict exists between the instant case and *Burton* v. *Ciccone*, 484 F. 2d 1322 (C.A. 8). In *Burton* the plaintiff asserted, *inter alia*, that the Board did not have before it all the data required by the Rules of the Board. The court of appeals, relying upon a concurring opinion in *Scarpa* v. *United States Board of Parole*, 477 F. 2d 278 (C.A. 5, *en banc*), remanded to the district court for a determination whether the Board followed its rules in conducting that hearing. Here, however, the court below did not reach the merits of plaintiff's claim that the Board failed to follow its own rules, but rather determined that the discovery orders were not necessary to resolve that issue and constituted an abuse of discretion.

Rule 53(b), Fed. R. Civ. P., stating as its reasons the need to relieve a congested calendar, the complexity of the cases, and the fact that they would take a considerable amount of time to try. *Id.* at 253–254. After the court denied motions to vacate the order, mandamus petitions were filed in the Seventh Circuit. The court of appeals issued the writs and this Court affirmed. In rejecting a claim similar to that presented here, *i.e.*, that the court of appeals had assumed the role of a roving commission to supervise the district courts (Pet. 21), this Court concluded that "[s]upervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *Id.* at 250. This ruling was premised on the recognition that the writ of mandamus is properly available to prevent or deter the recurrence of an erroneous practice which the court of appeals seeks to discourage. *Id.* at 258–259. Consonant with this principle, mandamus has been deemed appropriate to prevent enforcement of erroneous or clearly unnecessary orders. See *Pfizer Inc.* v. *Lord*, 456 F. 2d 545, 548 (C.A. 8); *Metros* v. *United States District Court for the District of Colo.*, 441 F. 2d 313, 315 (C.A. 10); *Harper and Row Publishers, Inc.* v. *Decker*, 423 F. 2d 487 (C.A. 7), affirmed by an equally divided Court, 400 U.S. 348; *United States* v. *Hughes*, 413 F. 2d 1244, 1248–1249 (C.A. 5), vacated with directions to dismiss as moot, *sub. nom. United States* v. *Gifford-Hill-American, Inc.*, 397 U.S. 93; *United States* v. *Hemphill*, 369 F. 2d 539, 543 (C.A. 4); *In re United States*, 348 F. 2d 624 (C.A. 1); *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (C.A.

9). See also, 8 Wright and Miller, *Federal Practice and Procedure: Civil* § 2006, pp. 32–33 (1970 ed.).

The holding below fully comports with this line of authority. Here, the complaints of the three plaintiff-intervenors urged that the procedures then employed by the Board of Parole are unconstitutional and at variance with the statutory grant of parole authority.[8] As these procedures were fully set forth in the Code of Federal Regulations and the Rules of the

[8] On September 24, 1973, the Board of Parole issued regulations implementing new procedures for granting parole. 28 C.F.R. 2.13, *et seq.* (38 Fed. Reg. 26653). These regulations require that, after a parole hearing, the panel holding the hearing and making the parole decision "shall inform the prisoner of the decision and, if parole is denied, of the reasons therefor" (28 C.F.R. 2.15(a) (38 Fed. Reg. 26653)). The regulations further provide 28 C.F.R. 2:15(b) (38 Fed. Reg. 26653) that the reasons for parole denial may include, but are not limited to, the following reasons (with further specifications where appropriate):

"(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

"(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

"(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

"(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life."

Section 2.15(c) provides:

"Written notification of the decision shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. If parole is denied, the prisoner shall also receive in writing as part of the decision the reasons therefor." This program became effective on October 1, 1973, in the Board's Northeast Region (see 38 Fed. Reg. 26652 for the area included in the Northeast Region) and is being extended to the remainder of the country as rapidly as personnel and the creation of new facilities permit. These procedures are currently in effect in the federal reformatory at Petersburg.

United States Board of Parole, no factual development was necessary. Moreover, while petitioners seek to characterize their suit as a class action for purposes of unlimited discovery—although the district court has not yet so declared it—this does not alter the nature of the cause of action nor the questions to be resolved. There was thus no basis for permitting plaintiffs to probe the confidential parole records of seventy-eight federal inmates not parties to the litigation; moreover, the interrogatories bore, at best, only slight relevance to the question at issue. In any event, the Board of Parole has responded under oath to those interrogatories concerning the parole determinations made with regard to the plaintiff-intervenors. Thus, we submit, the district court has sufficient evidence to pass on the issue presented.

In these circumstances, the court of appeals properly found compelling and extraordinary circumstances which warranted mandamus relief.[9]

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[9] The unreported decision of the Court of Appeals for the District of Columbia Circuit in *United States Board of Parole* v. *Bryant*, No. 72–1166, decided March 23, 1972, is not in conflict with the opinion below. There, as petitioners note, the court declined to issue a writ of mandamus to prevent the deposition of the Chairman of the Board of Parole. However, the court in *Bryant* noted:

"This court assumes that the District Court, both in providing for oral deposition, and in its contemplation of the conduct of such deposition, has in mind the need for discretion to assure that the discovery will be related to the objective of furnishing the District Court with a basis for ruling on the question before it, that oral discovery going beyond discovery on interrogatories is necessary and will not be unduly burdensome. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420; *Peoples* v. *Department of Agriculture*, 427 F.2d 561, 567. The deposition will

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1974.

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presumably avoid inquiry into mental processes of a particular decision making unless it is genuinely material to substantial issues. In this regard, the transcript reveals that respondent advised plaintiff that he would decline to order production of particular records. There is no doubt of the need for obviating avoidable burdens on the time of the chairman of the Board of Parole, particularly since it appears the board is now engaged in its own consideration of revision of its procedures."

Here, on the other hand, the court of appeals was presented with two discovery orders which contained none of the limitations suggested in *Bryant*. Indeed, with respect to the depositions of the members of the Youth Division, counsel for plaintiff advised the district court that the thrust of the depositions was directed at ascertaining the reasons underlying the decision to grant Novak parole. Therefore, it is evident that plaintiffs intended to inquire into and the district court intended to allow inquiry into, the mental processes of the Board members concerning matters not genuinely material to substantial issues raised by plaintiff-intervenors. As the Court noted, in *United States* v. *Morgan*, 315 U.S. 422, and, indeed, in *Bryant*, such an inquiry is generally impermissible. Furthermore, the order, which requires the Board to respond to lengthy interrogatories, was clearly burdensome and likewise in violation of the District of Columbia Circuit's opinion. Thus, the decision in *Bryant* is factually dissimilar to the instant case and the holding there is inapposite here.

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